

APPEAL

**United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:04-cv-11109-RGS
Internal Use Only**

Lexington Insurance Company et al v. Virginia Surety
Company, Incorporated
Assigned to: Judge Richard G. Stearns
Cause: 28:1332 Diversity-Insurance Contract

Date Filed: 05/26/2004
Jury Demand: None
Nature of Suit: 110 Insurance
Jurisdiction: Diversity

Plaintiff

Lexington Insurance Company

represented by **Mark E. Cohen**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED

Plaintiff

**National Union Fire Insurance
Company of Pittsburgh, PA.**

represented by **Mark E. Cohen**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Gerald S. Frim
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

**Virginia Surety Company,
Incorporated**

represented by **John Michael Stephan**
Mintz, Levin, Cohn, Ferris, Glovsky &
Popeo, PC

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Counter Claimant

**Virginia Surety Company,
Incorporated**

represented by **Joseph G. Blute**
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John Michael Stephan
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V.

Counter Defendant

Lexington Insurance Company

represented by **Mark E. Cohen**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Gerald S. Frim
(See above for address)
ATTORNEY TO BE NOTICED

Counter Defendant

**National Union Fire Insurance
Company of Pittsburgh, PA.**

represented by **Mark E. Cohen**
(See above for address)
LEAD ATTORNEY








*ATTORNEY TO BE NOTICED***Gerald S. Frim**

(See above for address)













*ATTORNEY TO BE NOTICED***Counter Claimant****Virginia Surety Company,
Incorporated**represented by **Joseph G. Blute**
(See above for address)













V.

Counter Defendant**Lexington Insurance Company**represented by **Gerald S. Frim**
(See above for address)
*ATTORNEY TO BE NOTICED***Counter Defendant****National Union Fire Insurance
Company of Pittsburgh, PA.**represented by **Gerald S. Frim**
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
05/26/2004	 1	COMPLAINT Filing fee: \$ 150, receipt number 56206, filed by Lexington Insurance Company.(Flaherty, Elaine) (Entered: 05/27/2004)
05/26/2004	 2	If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Bowler. (Flaherty, Elaine) (Entered: 05/27/2004)
05/26/2004	 2	CORPORATE DISCLOSURE STATEMENT by Lexington Insurance Company. (Flaherty, Elaine) (Entered: 05/27/2004)
05/26/2004	 3	CORPORATE DISCLOSURE STATEMENT by National Union Fire Insurance Company of Pittsburgh, PA.. (Flaherty, Elaine) (Entered: 05/27/2004)
07/07/2004	 5	STIPULATION extending time to answer by 7/28/04 by Lexington Insurance Company. Virginia Surety Company, Incorporated. (Flaherty, Elaine) (Entered: 07/14/2004)
07/08/2004	 4	SUMMONS Returned Executed Virginia Surety Company, Incorporated served on 6/9/2004, answer due 6/29/2004. (Flaherty, Elaine) (Entered: 07/08/2004)
07/28/2004	 6	ANSWER to Complaint with Jury Demand, COUNTERCLAIM against Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA. by Virginia Surety Company, Incorporated.(Flaherty, Elaine) (Entered: 07/29/2004)










07/28/2004	<u>37</u>	MOTION to Strike exhibit E and paragraph 17 of complaint by Virginia Surety Company, Incorporated.(Flaherty, Elaine) (Entered: 07/29/2004)
07/29/2004	<u>3</u>	*** Attorney John Michael Stephan for Virginia Surety Company, Incorporated added. (Flaherty, Elaine) (Entered: 07/29/2004)
08/02/2004	<u>38</u>	NOTICE of Scheduling Conference. Scheduling Conference set for 9/1/2004 03:45 PM in Courtroom 21 before Judge Richard G. Stearns. (Johnson, Mary) (Entered: 08/03/2004)
08/02/2004	<u>39</u>	NOTICE of Scheduling Conference. Scheduling Conference set for 9/1/2004 03:45 PM in Courtroom 21 before Judge Richard G. Stearns. (Johnson, Mary) (Entered: 08/03/2004)
08/03/2004	<u>3</u>	Remark to counsel. The Notice of 16b Conference for September 1, 2004 was electronically sent to counsel in this case INCORRECTLY. A CORRECTED Notice will be electronically sent shortly for CA 04-11109-RGS(Lexington Ins. v. Virginia Surety Co.). Mary Johnson, Deputy Clerk to Stearns, DJ. (Johnson, Mary) (Entered: 08/03/2004)
08/11/2004	<u>310</u>	MOTION for Extension of Time to 8/25/04 to oppose motion to strike exhibit E and Paragraph 17 of original complaint by Lexington Insurance Company.(Flaherty, Elaine) (Entered: 08/16/2004)
08/16/2004	<u>311</u>	ANSWER to Counterclaim by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA..(Flaherty, Elaine) (Entered: 08/18/2004)
08/23/2004	<u>3</u>	Judge Richard G. Stearns : Endorsed ORDER entered granting <u>10</u> Motion for Extension of Time (Flaherty, Elaine) (Entered: 08/24/2004)
08/26/2004	<u>313</u>	NOTICE of no opposition by Lexington Insurance Company re <u>7</u> MOTION to Strike (Flaherty, Elaine) (Entered: 09/01/2004)
08/27/2004	<u>312</u>	JOINT STATEMENT re scheduling conference. (Flaherty, Elaine) (Entered: 09/01/2004)
09/01/2004	<u>3</u>	Electronic Clerk's Notes for proceedings held before Judge Richard G. Stearns : Scheduling Conference held on 9/1/2004. Attys. Cohen and Maselek present for the pltf. Attys. Blute and Stephan present for the deft. All discovery other than non-expert discovery shall be completed by 6-1-05. On or before 7-1-05, either side has the option to file a dispositive motion. If no dispositive motions are filed, the parties can continue with the proposed discovery schedule agreed to by each side. (Court Reporter None.) (Johnson, Mary) Modified on 9/16/2004 (Johnson, Mary). (Entered: 09/16/2004)
09/02/2004	<u>314</u>	CERTIFICATION pursuant to Local Rule 16.1 by Virginia Surety Company, Incorporated.(Flaherty, Elaine) (Entered: 09/07/2004)
09/17/2004	<u>3</u>	Judge Richard G. Stearns : Electronic ORDER entered granting <u>7</u> Motion to Strike <u>7</u> MOTION to Strike (Flaherty, Elaine) (Entered: 09/20/2004)
11/23/2004	<u>315</u>	Unopposed MOTION for Leave to File amended complaint by Lexington



		Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA..(Flaherty, Elaine) (Entered: 11/24/2004)
11/29/2004		Judge Richard G. Stearns : Electronic ORDER entered granting <u>15</u> Motion for Leave to File (Flaherty, Elaine) (Entered: 11/30/2004)
11/29/2004	 16	AMENDED COMPLAINT against Virginia Surety Company, Incorporated . filed by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA..(Flaherty, Elaine) (Entered: 12/02/2004)
12/06/2004	 17	ANSWER to Amended Complaint, COUNTERCLAIM against Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA. by Virginia Surety Company, Incorporated. (Attachments: # <u>1</u> # <u>2</u> # <u>3</u>)(Flaherty, Elaine) (Entered: 12/08/2004)
12/23/2004	 18	ANSWER to Counterclaim by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA..(Flaherty, Elaine) (Entered: 12/28/2004)
04/12/2005	 19	MOTION to Modify scheduling order and for an order limiting discovery by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA..(Flaherty, Elaine) (Entered: 04/13/2005)
04/12/2005	 20	AFFIDAVIT in Support re <u>19</u> MOTION to Modify scheduling order and for an order limiting discovery. (Flaherty, Elaine) (Entered: 04/13/2005)
04/12/2005	 21	AFFIDAVIT in Support re <u>19</u> MOTION to Modify scheduling order and for an order limiting discovery. (Flaherty, Elaine) (Entered: 04/13/2005)
04/12/2005	 22	MEMORANDUM in Support re <u>19</u> MOTION to Modify scheduling order and for an order limiting discovery filed by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA.. (Attachments: # <u>1</u>)(Flaherty, Elaine) (Entered: 04/13/2005)
04/26/2005	 23	MEMORANDUM in Opposition re <u>19</u> MOTION to Modify scheduling order and for an order limiting discovery filed by Virginia Surety Company, Incorporated. (Flaherty, Elaine) (Entered: 04/27/2005)
05/02/2005		Judge Richard G. Stearns : Electronic ORDER entered denying <u>19</u> Motion for Modification "the proposed phasing of discovery is needlessly complex and offers little by way of advantage to compensate for the delays inherent in the proposed scheduled." cc: all counsel of record. (Flaherty, Elaine) (Entered: 05/02/2005)
08/12/2005	 24	Joint MOTION for Extension of Time to 11/30/05 to conduct discovery; to 1/10/05 to file dispositive motions: responses by 2/14/05 by Lexington Insurance Company, Virginia Surety Company, Incorporated.(Flaherty, Elaine) (Entered: 08/15/2005)
08/16/2005		Judge Richard G. Stearns : Electronic ORDER entered granting in part <u>24</u> Motion for Extension of Time "Oppositions to dispositive motions are to be filed within twenty-one (21) days of 1/10/05." (Flaherty, Elaine) (Entered: 08/16/2005)

11/22/2005		Joint MOTION for Extension of Time to 3/31/06 to Complete Discovery; file dispositive motions by 4/17/06; opps 5/8/06 by Lexington Insurance Company, Virginia Surety Company, Incorporated.(Flaherty, Elaine) (Entered: 11/29/2005)
11/23/2005		Judge Richard G. Stearns : Electronic ORDER entered granting <u>25</u> Motion for Extension of Time to Complete Discovery (Flaherty, Elaine) (Entered: 11/29/2005)
03/22/2006		Joint MOTION for Extension of Time to 120 days to Complete Discovery by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA., Virginia Surety Company, Incorporated.(Frim, Gerald) (Entered: 03/22/2006)
03/22/2006		STATEMENT OF COUNSEL of Lexington re Complainece with L.R. 7.1 (a)(2) re <u>26</u> Joint MOTION for Extension of Time to 120 days to Complete Discovery by Lexington Insurance Company. (Frim, Gerald) (Entered: 03/22/2006)
03/31/2006		Judge Richard G. Stearns : Electronic ORDER entered denying <u>26</u> Motion for Extension of Time to Complete Discovery (Flaherty, Elaine) (Entered: 03/31/2006)
04/05/2006		MOTION for Reconsideration re Order on Motion for Extension of Time to Complete Discovery by Virginia Surety Company, Incorporated. (Cramb, Nicholas) (Entered: 04/05/2006)
04/05/2006		AFFIDAVIT of Nicholas C. Cramb in Support re <u>28</u> MOTION for Reconsideration re Order on Motion for Extension of Time to Complete Discovery filed by Virginia Surety Company, Incorporated. (Attachments: # <u>1</u> Exhibit A# <u>2</u> Exhibit B)(Cramb, Nicholas) (Entered: 04/05/2006)
04/06/2006		Joint MOTION for Extension of Time to May 1, 2006 to File Dispositive Motions by Virginia Surety Company, Incorporated.(Cramb, Nicholas) (Entered: 04/06/2006)
04/06/2006		Judge Richard G. Stearns : Electronic ORDER entered granting <u>30</u> Motion for Extension of Time. Dispositive Motions due by 5/1/2006. (Johnson, Mary) (Entered: 04/06/2006)
04/07/2006		Judge Richard G. Stearns : Electronic ORDER entered granting <u>28</u> Motion for Reconsideration "Allowed. Discovery is to be completed in 120 days of the date of this Order." (Flaherty, Elaine) (Entered: 04/10/2006)
07/28/2006		MOTION for Order to Set Briefing Schedule for Dispositive Motions by all parties.(Frim, Gerald) (Entered: 07/28/2006)
08/04/2006		Judge Richard G. Stearns : Electronic ORDER entered granting <u>31</u> Motion for Order. "dispositive motions due 9-29-06;oppositions due 10-30-06; reply briefs due by 11-13-06." (Johnson, Mary) (Entered: 08/07/2006)

09/15/2006	<u>32</u>	Joint MOTION for Leave to File Excess Pages of <i>All Parties</i> by Virginia Surety Company, Incorporated, Virginia Surety Company, Incorporated. (Cramb, Nicholas) (Entered: 09/15/2006)
09/19/2006		Judge Richard G. Stearns : Electronic ORDER entered granting <u>32</u> Motion for Leave to File Excess Pages "Thirty pages (but no more) is acceptable." (Flaherty, Elaine) (Entered: 09/19/2006)
09/29/2006	<u>33</u>	MOTION for Summary Judgment by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA., Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA.. (Attachments: # <u>1</u> Memorandum of Law# <u>2</u> Statement of Undisputed Facts# <u>3</u> Affidavit Affidavit of Charles J. Messery# <u>4</u> Affidavit Affidavit of Jack B. Gould# <u>5</u> Affidavit Affidavit of Elizabeth Viscione)(Frim, Gerald) (Entered: 09/29/2006)
09/29/2006	<u>34</u>	NOTICE by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA., Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA. re <u>33</u> MOTION for Summary Judgment : <i>Notice of Filing Exhibits with Clerk's Office</i> (Frim, Gerald) (Entered: 09/29/2006)
09/29/2006	<u>35</u>	MOTION for Summary Judgment by Virginia Surety Company, Incorporated.(Cramb, Nicholas) (Entered: 09/29/2006)
09/29/2006	<u>36</u>	MEMORANDUM in Support re <u>35</u> MOTION for Summary Judgment filed by Virginia Surety Company, Incorporated. (Cramb, Nicholas) (Entered: 09/29/2006)
09/29/2006	<u>37</u>	AFFIDAVIT in Support re <u>35</u> MOTION for Summary Judgment. (Attachments: # <u>1</u> Exhibit A# <u>2</u> Exhibit B# <u>3</u> Exhibit C# <u>4</u> Exhibit D# <u>5</u> Exhibit E# <u>6</u> Exhibit F# <u>7</u> Exhibit G# <u>8</u> Exhibit H# <u>9</u> Exhibit I, Part 1# <u>10</u> Exhibit I, Part 2# <u>11</u> Exhibit J)(Cramb, Nicholas) (Entered: 09/29/2006)
09/29/2006	<u>38</u>	STATEMENT of facts re <u>35</u> MOTION for Summary Judgment. (Cramb, Nicholas) (Entered: 09/29/2006)
09/29/2006	<u>39</u>	NOTICE by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA., Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA. re <u>33</u> MOTION for Summary Judgment -- <i>Request for Oral Argument and Rule 7.1(A)(2) Certification</i> (Frim, Gerald) (Entered: 09/29/2006)
10/04/2006	<u>40</u>	CORPORATE DISCLOSURE STATEMENT by Virginia Surety Company, Incorporated. (Cramb, Nicholas) (Entered: 10/04/2006)
10/26/2006		ELECTRONIC NOTICE of Hearing on Motion <u>35</u> MOTION for Summary Judgment. <u>33</u> MOTION for Summary Judgment: Motion Hearing set for 2/2/2007 02:30 PM in Courtroom 21 before Judge Richard G. Stearns. (Johnson, Mary) (Entered: 10/26/2006)
10/30/2006	<u>41</u>	Opposition re <u>33</u> MOTION for Summary Judgment filed by Virginia Surety Company, Incorporated. (Cramb, Nicholas) (Entered: 10/30/2006)

10/30/2006	<u>42</u>	Response by Virginia Surety Company, Incorporated to <u>33</u> MOTION for Summary Judgment, <i>Attachment 2 - Statement of Undisputed Facts</i> . (Cramb, Nicholas) (Entered: 10/30/2006)
10/30/2006	<u>43</u>	MEMORANDUM in Opposition re <u>35</u> MOTION for Summary Judgment of Defendant Virginia Surety Co. filed by all plaintiffs. (Attachments: # <u>1</u> Exhibit Exhibit A# <u>2</u> Exhibit Exhibit B# <u>3</u> Exhibit Exhibit C# <u>4</u> Exhibit Exhibit D# <u>5</u> Exhibit Exhibit E)(Frim, Gerald) (Entered: 10/30/2006)
10/30/2006	<u>44</u>	Statement of Material Facts L.R. 56.1 re <u>35</u> MOTION for Summary Judgment of Defendant, Virginia Surety Co., Inc. filed by all plaintiffs. (Attachments: # <u>1</u> Exhibit Exhibit A# <u>2</u> Exhibit Exhibit B# <u>3</u> Exhibit Exhibit C)(Frim, Gerald) (Entered: 10/30/2006)
11/13/2006	<u>45</u>	REPLY to Response to Motion re <u>33</u> MOTION for Summary Judgment, <u>35</u> MOTION for Summary Judgment filed by all plaintiffs. (Frim, Gerald) (Entered: 11/13/2006)
11/13/2006	<u>46</u>	REPLY to Response to Motion re <u>35</u> MOTION for Summary Judgment filed by Virginia Surety Company, Incorporated. (Cramb, Nicholas) (Entered: 11/13/2006)
11/13/2006	<u>47</u>	AFFIDAVIT in Support re <u>46</u> Reply to Response to Motion for Summary Judgment of Virginia Surety Company. (Attachments: # <u>1</u> Exhibit A) (Cramb, Nicholas) (Entered: 11/13/2006)
11/27/2006	<u>48</u>	MOTION for Leave to File <i>Surreply</i> by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA.. (Attachments: # <u>1</u> Exhibit 1 - Proposed Surreply of Plaintiffs)(Frim, Gerald) (Entered: 11/27/2006)
11/29/2006	<u>49</u>	Second MOTION to Strike <i>the Heist Letter</i> by Virginia Surety Company, Incorporated.(Cramb, Nicholas) (Entered: 11/29/2006)
12/11/2006	<u>50</u>	Opposition re <u>48</u> MOTION for Leave to File <i>Surreply</i> filed by Virginia Surety Company, Incorporated, Virginia Surety Company, Incorporated. (Stephan, John) (Entered: 12/11/2006)
12/13/2006	<u>51</u>	Opposition re <u>49</u> Second MOTION to Strike <i>the Heist Letter</i> filed by all plaintiffs. (Frim, Gerald) (Entered: 12/13/2006)
12/14/2006	<u>5</u>	Judge Richard G. Stearns : Electronic ORDER entered denying <u>48</u> Motion for Leave to File; (Flaherty, Elaine) (Entered: 12/14/2006)
02/01/2007	<u>52</u>	MOTION for Leave to File <i>Supplemental Authority</i> by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA.. (Attachments: # <u>1</u> Exhibit 1 - Supplemental Authority) (Frim, Gerald) (Entered: 02/01/2007)
02/02/2007	<u>5</u>	ElectronicClerk's Notes for proceedings held before Judge Richard G. Stearns: Motion Hearing held on 2/2/2007 re: <u>33</u> MOTION for Summary Judgment filed by Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA., and <u>35</u> MOTION for Summary Judgment filed by Virginia Surety Company, Incorporated.

		Matter taken under advisement. (Court Reporter Carol Scott.) (Hamilton, Maria Raia) (Entered: 02/02/2007)
02/16/2007		Judge Richard G. Stearns : Electronic ORDER entered granting <u>52</u> Motion for Leave to File: Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Hamilton, Maria Raia) (Entered: 02/16/2007)
02/20/2007	 53	NOTICE by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA. <i>of Filing Supplemental Authority in Support of Motion for Summary Judgment</i> (Attachments: # <u>1</u> Exhibit 1 - Supplemental Authority)(Frim, Gerald) (Entered: 02/20/2007)
05/03/2007	 54	Judge Richard G. Stearns : ORDER entered. MEMORANDUM AND ORDER on Cross Motions for Summary Judgment. ENTERED. "...For the foregoing reasons, Lexington's and National Union's motion for summary judgment is DENIED. Virginia Surety's motion to strike is ALLOWED. Virginia Surety's cross-motion for summary judgment is ALLOWED, in part, as explained in this opinion. The parties will discharge their obligations in a manner consistent with the court's declaration." (Flaherty, Elaine) Modified on 5/3/2007 (Johnson, Mary). (Entered: 05/03/2007)
05/14/2007	 55	MOTION for Clarification re <u>54</u> Memorandum & ORDER,, by Lexington Insurance Company. National Union Fire Insurance Company of Pittsburgh, PA..(Frim, Gerald) (Entered: 05/14/2007)
05/14/2007	 56	MEMORANDUM in Support re <u>55</u> MOTION for Clarification re <u>54</u> Memorandum & ORDER,, filed by Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA.. (Frim, Gerald) (Entered: 05/14/2007)
05/14/2007	 57	CERTIFICATE OF CONSULTATION re <u>55</u> MOTION for Clarification re <u>54</u> Memorandum & ORDER,,. (Frim, Gerald) (Entered: 05/14/2007)
05/25/2007	 58	Opposition re <u>55</u> MOTION for Clarification re <u>54</u> Memorandum & ORDER,, filed by Virginia Surety Company, Incorporated. (Cramb, Nicholas) (Entered: 05/25/2007)
05/31/2007	 59	NOTICE OF APPEAL as to <u>54</u> Memorandum & ORDER,, by Lexington Insurance Company. National Union Fire Insurance Company of Pittsburgh, PA. Filing fee \$ 455. receipt number 1542493 NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov/clerks/transcript.htm MUST be completed and submitted to the Court of Appeals.Appeal Record due by 6/20/2007. (Frim, Gerald) (Entered: 05/31/2007)
06/01/2007	 60	Judge Richard G. Stearns : ORDER entered finding as moot <u>55</u> Motion for Clarification (Flaherty, Elaine) (Entered: 06/01/2007)

06/06/2007		MOTION for Reconsideration re <u>60</u> Order on Motion for Clarification by Virginia Surety Company, Incorporated.(Stephan, John) (Entered: 06/06/2007)
06/08/2007		Judge Richard G. Stearns : ORDER on Motion for Reconsideration, entered denying 61 Motion for Reconsideration "without prejudice" (Flaherty, Elaine) (Entered: 06/08/2007)